MOTION FILED
JUN 7 1991

No. 90-5844

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TERRY FOUCHA,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF LOUISIANA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, the American Orthopsychiatric Association, *et al.*, respectfully move the Court for leave to file a Brief *Amici Curiae* in the above-entitled case. Counsel for Petitioner has granted his consent to the filing of this brief. Counsel for Respondent has informally notified counsel for movants that he will not consent.

Amici include national professional and voluntary associations concerned with the care of people with mental disabilities and also concerned with civil liberties under the U.S. Constitution. *Amici* thus have knowledge and expertise in the diverse areas of the treatment of people with mental illness, the administration of mental health facilities, the operation of the defense of insanity in the criminal justice system, and the rights of persons in mental health facilities under the Fourteenth Amendment.

The American Orthopsychiatric Association is an interdisciplinary professional organization of mental health professionals, including psychiatrists, psychologists, social workers, educators, and allied professionals concerned

with the problems, causes, and treatment of mental illness.

The National Mental Health Association (NMHA) is a national voluntary organization of individuals concerned about the needs of persons with mental illness and their families. Founded in 1909 by Clifford Beers, who suffered from a serious mental illness, the Association has historically led efforts to reform mental health care in institutions and the community. The NMHA has grown into a network of over 500 local chapters and state divisions of volunteers and staff who are committed to advocacy for the improved care and treatment of people with mental illnesses, the promotion of mental health, and the prevention of mental illness. The Association conducts studies and makes policy recommendations, such as the 1983 report, *Myths and Realities: Report of the National Commission on the Insanity Defense*, concerning use of the insanity defense, including tests, disposition, and treatment. Also, the Association frequently files *amicus* briefs in cases involving issues of mental conditions and the rights of patients and ex-patients.

The American Association on Mental Retardation (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Unlike the mental health organizations, AAMR joins this brief not because of direct involvement with persons recovered from mental illness, but rather from its concern about the scope of regulatory confinement under the substantive meaning of the Due Process Clause. AAMR has appeared before this Court on numerous occasions as *amicus curiae*, most recently in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

The National Association of Protection and Advocacy Systems represents Protection and Advocacy systems in 50 states and six territories, created pursuant to 42 U.S.C. § 10801 *et seq.* These agencies have the statutory mandate to advocate for the rights of persons with mental illness. The Protection and Advocacy systems represented over 100,000 persons with mental disabilities in 1990.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights. The ACLU of Louisiana is one of its statewide affiliates. This case raises issues of substantive and procedural due process that are of central importance to the ACLU and its affiliates. In furtherance of its organizational views on these matters, the ACLU has often appeared before this Court, both as direct counsel and as *amicus curiae*. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *O'Connor v. Donaldson*, 422 U.S 563 (1975).

Amici believe that the Louisiana statute permitting commitment of persons who have no mental illness is unconstitutional. *Amici* also believe that affirmance of the judgment of the Supreme Court of Louisiana would erode the substantive protections of the Due Process Clause recognized in this Court's previous decisions.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying *amici* brief in the present case in support of the Petitioner.

Respectfully submitted,

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THE AMERICAN CIVIL LIBERTIES UNION,
AND THE ACLU OF LOUISIANA
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae include national professional and voluntary associations concerned with the care of people with mental disabilities and also concerned with civil liberties under the U.S. Constitution. For reasons stated in the attached motion, *amici* believe that the Louisiana statute permitting continued commitment of persons who have no mental illness is unconstitutional.

SUMMARY OF ARGUMENT

Petitioner was acquitted of the criminal charges brought against him. He was not convicted of any criminal offense, and therefore he cannot be punished by the state of Louisiana. Nor can he be convicted and punished on those charges at some point in the future.

Louisiana had the right to seek Petitioner's commitment following the verdict because his acquittal created a presumption of continuing mental illness and dangerousness. *Jones v. United States*, 463 U.S. 354 (1983). But the Louisiana statute goes much further and provides for continued indefinite confinement even when an acquittee has recovered from his mental illness unless the acquittee can somehow "prove" that he will not commit any dangerous acts in the future.

By breaking the essential connection between civil commitment and mental illness, Louisiana exceeds the scope of its authority to take away the liberty of persons who have not been convicted of any crime. Affirmance of the judgment of the Louisiana Supreme Court would obliterate the limits on the state's power of regulatory confinement that this Court carefully delineated in *Jones* and *United States v. Salerno*, 481 U.S. 739 (1987). To do so would turn mental hospitals into jails. But more importantly, it would leave few substantive (or procedural) limits on the state's ability to lock up those citizens it suspects might commit dangerous acts in the future. Such a result would be inconsistent with the protections of physical liberty that pervade the Constitution and this Court's cases.

ARGUMENT

I. ONCE PETITIONER RECOVERED FROM HIS MENTAL ILLNESS, HIS CONTINUED CONFINEMENT EXCEEDED THE STATE'S AUTHORITY UNDER THE SUBSTANTIVE MEANING OF THE DUE PROCESS CLAUSE.

A. Regulatory Confinement, in the Absence of Conviction for a Crime, Must Be Carefully Limited in Substantive Scope.

Deprivation of an individual's physical freedom without a criminal conviction must only be permitted in narrowly defined circumstances. The application of Louisiana's law to reach Petitioner and other persons who are no longer mentally ill exceeds the power that states may exercise under the Due Process Clause. The paramount importance of physical freedom within our constitutional system requires that the statute be invalidated as a violation of substantive due process.

1. *Freedom from Physical Confinement Has Been Held to Merit the Highest Level of Constitutional Protection.*

It is well established that the substantive meaning of the Due Process Clause of the Fourteenth Amendment places significant limits on state action, particularly when the state proposes to deprive individuals of their physical freedom. As this Court recently noted, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, —— U.S. ——, 110 S. Ct. 975, 983 (1990). This Court has long recognized that freedom from physical confinement is at the highest level of rights guaranteed by the Constitution. "[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary

governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). When the Court discusses other substantive liberties protected by the Constitution, it typically begins the analysis with the most basic liberty, which is freedom from confinement. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint but also . . . ."). Whatever disagreement there may be concerning the precise contours of the liberties protected by the Due Process Clause, *see Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion); *id.* at 132 (O'Connor, J., concurring), there can be no doubt that in the minds of the framers and ratifiers of the Fifth and Fourteenth Amendments, and in the understanding of every succeeding generation, physical confinement is the deprivation of freedom requiring the most compelling justification.[1]

Even when contrasted to other rights which the Court has recognized as fundamental under the Due Process Clause, freedom from confinement has been treated as *sui generis*, meriting more vigilant protection. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981). *See generally County of Riverside v. McLaughlin*, —— U.S. ——, 59 U.S.L.W. 4413, 4417 (1991); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

The state may deprive a person of physical freedom through conviction of a criminal offense. *Vitek v. Jones*, 445 U.S. 480, 493 (1980). The gravity of this enterprise and the magnitude of the loss suffered by individuals so incarcerated are reflected in the procedural protections guaranteed by the Constitution and this Court before the punishment will be permitted.[2]

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[1] Indeed, recognition of the central importance of physical liberty preceded the adoption of the Bill of Rights. *See* U.S. Const. art. I, § 9, protecting the right to writs of habeas corpus.

[2] *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (a defendant in a criminal case, when faced with possible confinement, has a right to appointed counsel); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (defendant has a right to a trial by jury if he faces a potential sentence of more than six months); *see also Argensinger*, 407 U.S. at 28 (right to notice of the charges); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compulsory process to obtain witnesses); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965) (right to confront and cross examine witnesses).

A source and embodiment of these protections is the principle that defendants awaiting trial are presumed to be innocent. *Cool v. United States*, 409 U.S. 100, 104 (1972); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"). But the presumption that an individual defendant is innocent was not adopted because the courts concluded as an empirical matter that most criminal defendants are factually innocent, but rather because "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979).[3] As a result, the state is required to prove that it is entitled to incarcerate a criminal defendant by demonstrating guilt beyond a reasonable doubt. *Id.* at 424; *In re Winship*, 397 U.S. 358, 364 (1970).

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[3] It is worth noting that unlike defendants awaiting trial, Petitioner is not *presumed* by the law to be innocent; rather, he has been *adjudicated* to be innocent. Thus the state is not waiting for its chance to convict him on the charges in the bill of information; it has already lost that opportunity permanently when Petitioner was acquitted.

Just as the procedural protections found in the Bill of Rights and this Court's precedents demonstrate the Constitution's insistence that the state's power to incarcerate individuals must be carefully rationed, the substantive limitations of the Due Process Clause and the Eighth Amendment's prohibition on cruel and unusual punishment perform a similar function. For example, the state may not criminalize a status and thereby incarcerate those who find themselves within the boundaries of that class. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *see also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.").

The central teaching of all these cases is that the framers of the Constitution provided extensive procedural and substantive protections so citizens would be free from arbitrary deprivations of their physical liberty. This Court's modern cases involving regulatory confinement teach that when the state seeks to confine an individual without a criminal conviction it is not free to evade casually these protections which are guaranteed to criminal defendants. This is because an individual who loses his physical liberty through what the state labels a "regulatory" confinement suffers a loss fully equivalent to that experienced by an incarcerated convict.

2. *When This Court Has Permitted Regulatory Deprivations of Liberty, It Has Insisted on Stringent Substantive and Procedural Protections for the Individual Whose Liberty Is at Risk.*

The principal way in which a state may deprive an individual of physical liberty is by a conviction for a criminal offense. It was the potential for loss of liberty (and loss of life in capital cases) that led to the enactment of the procedural and substantive protections of defendants found in the Bill of Rights.

In recent years, this Court has recognized that, in certain carefully limited circumstances, the state may confine individuals for regulatory, as well as punitive purposes. *Addington v. Texas*, 441 U.S. 418 (1979); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. United States*, 463 U.S. 354 (1983); *United States v. Salerno*, 481 U.S. 739 (1987). In each of these instances, the state's goal was of a compelling nature, the law was narrowly tailored to the accomplishment of that purpose, and the duration of the "regulatory" deprivation of physical freedom was carefully limited.

In the case of detention of defendants awaiting criminal trial, these principles are clearly evident in this Court's precedents. Where the state's purpose is an arraignment or the filing of charges, the state's interest may temporarily outweigh the individual's right to be free, pending a judicial determination of probable cause. The durational limit is strict and explicit; confinement can last no longer than reasonable, and in no circumstances longer than 48 hours. *County of Riverside v. McLaughlin*, —— U.S. ——, 59 U.S.L.W. 4413, 4417 (1991). An individual's liberty interest may also be limited when it is proven that detention is necessary to assure a defendant's appearance at trial or to protect the safety of witnesses. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). When the state's purpose is to insure the defendant's presence at trial, the Eighth Amendment prohibits requiring bail in excess of the amount necessary to accomplish that purpose. *Id.* at 5.

In addition, this Court has recognized that the government may detain certain individuals while they are awaiting trial where that detention is proven to be necessary to prevent violent crimes the defendant would commit if released on bail. *United States v. Salerno*, 481 U.S. 739 (1987). But, here too, this Court has approved such regulatory confinement only under carefully limited circumstances. As Chief Justice Rehnquist has observed

for the Court, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755. The *Salerno* case involved such a limited exception contained in the Bail Reform Act of 1984. The government interest in public safety in that case involved potential danger from *an individual whom the government hoped and expected to confine and incapacitate in the near future through a conviction on his pending criminal charge.* Even then, this Court has approved such detention only for "the most serious of crimes." *Id.* at 747. Those are defined as "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." *Id.* Moreover, the "maximum length of pretrial detention" (and thus the exception to the general rule against deprivation of physical liberty without the protections of the criminal law) was carefully circumscribed by "the stringent time limitations" inherent in the right to a speedy trial on criminal charges. *Id.*[4]

Similar limitations have been placed on the state's power to commit persons with mental illness. This Court has long recognized the loss of freedom involved in civil commitment as a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 491 (1980). But in cases involving individuals who have a mental illness which renders them dangerous to themselves or others, the Court has also recognized a limited power of the state to confine for regulatory purposes related to that mental illness. Although the Court has not spelled out the substantive scope

[4] Similarly, the detention permitted in *Schall v. Martin*, 467 U.S. 253 (1984), was "strictly limited in time," *id.* at 269, because juveniles were "entitled to an expedited factfinding hearing," *id.* at 270, and was carefully tailored to the unique circumstances and government interests involved in the adjudication of juvenile delinquency cases.

of the state's power in this area comprehensively, it has recognized that "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426. All states have laws that permit the therapeutic confinement of individuals "suffering from mental illness which contributes or causes that person to be a danger to himself or others." La. Rev. Stat. Ann. § 28:54(A) (West 1989). *See* American Bar Foundation, *The Mentally Disabled and the Law* 50 (S. Brakel, J. Parry, & B. Weiner eds., 3d ed. 1985).

But the civil commitment power is also narrowly tailored to the state's regulatory purpose and by the limitations imposed on the confinement's duration. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The state cannot confine for mental illness alone, *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), and may not pursue its therapeutic objectives through confinement in an institution if less drastic means are available. *Id.* (*citing Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960)).

Most directly relevant to the case at bar, the Court has recognized the ability of the state to civilly commit individuals acquitted of criminal charges by reason of a defense of insanity. *Jones v. United States*, 463 U.S. 354 (1983). The justification for this authority to deprive an acquittee of physical liberty is the likelihood that the mental disability that produced the previous criminal act will produce similar acts in the future—acts which the state is unable to address through the ordinary processes of the criminal law because of the likelihood of another successful assertion of the insanity defense.

Civil commitment of insanity acquittees may be accomplished, however, only within strict limitations. The District of Columbia statute approved by this Court in *Jones* was premised on the fact that the defendant had

demonstrated his insanity at trial.[5] Most significantly, the duration of commitment of insanity acquittals is limited by the duration of the illness that occasions the commitment. Thus, this Court observed in *Jones*, "The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous." *Id.* at 368 (*citing O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975)) (emphasis added). The Court's use of the disjunctive was not inadvertent. To the contrary, the Court emphasized at another point in its opinion, that the release of an insanity acquittee "who recover[s] his sanity or is no longer dangerous," *id.* at 368, is mandated precisely because his "confinement rests on his continuing illness *and* dangerousness." *Id.* at 369 (emphasis added).

B. The Involuntary Confinement of an Insanity Acquittee Who Has Recovered from Mental Illness Lacks the Limitations of Time and Scope Required by the Due Process Clause.

Unlike these carefully limited regulatory laws, Louisiana's provision regarding insanity acquittees who are

[5] This Court has not resolved whether the presumption in *Jones* extends to cases in jurisdictions in which the verdict of acquittal conveys less certainty about the acquittee's mental disability and criminal conduct. *Jones*, 463 U.S. at 370. *See also* American Bar Association, *Criminal Justice Mental Health Standards*, Standard 7-7.4, Commentary at 425 n.18 (1989); Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 Cath. U.L. Rev. 961, 972 n.53 (1986). Such a distinction is not involved in this case because the allocation of the burden of persuasion on the issue of insanity at the criminal trial in Louisiana is similar to that in the District of Columbia statute at issue in *Jones*. *See* La. Code Crim. Proc. Ann. art. 652 (West 1981) and D.C. Code Ann. § 24-301(j) (1989).

no longer mentally ill[6] contains no such limitation. The state is not awaiting its opportunity to try petitioner, since jeopardy has attached with his acquittal. Nor is the state awaiting his recovery from his mental illness, *cf. Jones v. United States*, 463 U.S. 354, 366 (1983), since that has already occurred.

In the absence of these limitations, the sole justification for Louisiana's continuing confinement of Petitioner when he is no longer mentally ill is the prediction that he may be dangerous in the future. *His previous mental illness no longer has any relevance to the constitutionality of his confinement.* It does not make the current predictions of dangerous behavior any more accurate or his prospective dangerousness any more likely. Therefore his previous mental condition provides no additional support for his current confinement. As this Court has observed regarding civil commitment, "even if [a patient's] involuntary confinement was initially permissible, it could

[6] The state's experts unanimously concluded that Petitioner does not now have any mental illness. J.A. 15, 22. There was some testimony that Petitioner had an "anti-social personality," however no expert was of the view that this constituted a mental illness. The American Law Institute and other courts and commentators have reached the same conclusion. *See* A.L.I., Model Penal Code § 4.01(2) (1985); Uelmen, *The Psychiatrist, the Sociopath and the Courts: New Lines for an Old Battle*, 14 Loy. L.A.L. Rev. 1 (1980). *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual* xxix (3d ed. rev. 1987) ("cautionary statement" that the discussion of categories within the manual "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability.").

Since this case is a facial challenge to the constitutionality of the Louisiana statute, the details of Petitioner's mental condition are not strictly relevant. It is noteworthy, nevertheless, that once the clinicians determined that Petitioner no longer had any mental illness, their prediction concerning future dangerousness is, in a very real sense, no longer a clinical judgment. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). What they are asserting is that their expertise does not permit them to *preclude* the potential for future dangerousness. J.A. 18, 22.

not constitutionally continue after [its factual] basis no longer existed." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *see also* Chief Justice Burger's concurring opinion, "[e]qually important, confinement must cease when those reasons no longer exist." *Id.* at 580.

Stripped of any factual or legal connection to the mental illness that was the basis of Petitioner's acquittal, his continued indefinite involuntary confinement is not constitutionally distinguishable from a state simply confining persons who have no mental disability at all on the basis that someone has predicted that they will be dangerous in the future. Numerous groups in our society might be predicted, with varying degrees of accuracy, to be more likely than others to commit dangerous acts in the future. Factors of age, gender, and economic status may enhance the accuracy of such predictions up to a certain point. Previous encounters with law enforcement, even when they did not result in a conviction or after the individual's sentence has been completed, might also serve as part of the basis for such predictions. *Cf. Baxstrom v. Herold*, 383 U.S. 107 (1966). As long as a confined individual could not demonstrate that a state was intentionally employing a suspect classification, *see Washington v. Davis*, 426 U.S. 229, 239-41 (1976), it is doubtful that the Equal Protection Clause would prove to be a sufficient safeguard against the abuses of liberty inherent in such a scheme.

The principal constitutional infirmity in such a hypothetical scheme is not that the state might choose the criteria for prediction with insufficient care or precision, but rather that the state cannot, consistent with this Court's teachings on the substantive meaning of the Due Process Clause, deprive citizens of their liberty on the basis of a prediction of future conduct alone.

Following this Court's opinion in *Salerno*, it is clear that a mechanistic recitation of the standard substantive due process formula cannot fully capture the Constitution's requirements for regulatory confinement. The Court clearly held that freedom from physical confinement is a "fundamental" right. 481 U.S. at 750. At the same time, it held the government's interest in preventing crime to be "both legitimate and compelling." *Id.* at 749. But it would be grossly inaccurate to oversimplify *Salerno* as suggesting that the state's compelling interest in preventing crimes invariably overcomes an individual's interest in physical liberty.

If that were an accurate reading, every state would be free to establish general "dangerousness" courts, and every time the state could persuade the trier of fact that any citizen would be prospectively dangerous, it could lock him up indefinitely in "regulatory" confinement until the individual could prove that he no longer posed a threat to public safety.

It is obvious that such a statute would be unconstitutional. Therefore, this Court's precedents in cases like *Salerno* and *Jones* must be read more carefully to discern the limits on the state's ability to confine individuals on the basis of predicted future dangerousness. *Salerno* involved a statute under which confinement was carefully limited in duration, and under which the government was required to prove the defendant's dangerousness by clear and convincing evidence. *Jones* was premised on the acquittee's continuing mental illness and his right to obtain his release when that illness no longer existed.

The Louisiana statute contains neither of these sets of limitations, nor any comparable protections. It clearly exceeds the state's power to deprive individuals of their physical liberty.

II. PETITIONER'S CONTINUED CONFINEMENT VIOLATES THE PROCEDURAL REQUIREMENTS OF THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE.

Although *amici* believe that the central constitutional problem with the Louisiana law under which Petitioner is incarcerated is that it exceeds the state's power under the substantive meaning of the Due Process Clause, other constitutional approaches also illustrate the magnitude of the statute's excesses.

A. Once He Recovered from His Mental Illness, Petitioner Was Entitled to a Hearing at Which the State Bore the Burden of Persuasion by Clear and Convincing Evidence.

Petitioner has never been afforded a commitment hearing at which the state was required to demonstrate the necessity of his confinement by clear and convincing evidence. *See Addington*, 441 U.S. at 433. In *Jones*, this Court held that insanity acquittees were not entitled to an *Addington* hearing at the beginning of their commitment because the factual findings inherent in their acquittal were sufficient to indicate dangerousness. *Jones v. United States*, 463 U.S. 354, 364 (1983). This portion of the *Jones* holding appears sufficient to preclude any claim that Petitioner in the case at bar was entitled to an *Addington* hearing at the time of his initial commitment.

But Petitioner is also deprived of the opportunity for an *Addington* hearing subsequently, when the state conceded that he no longer had a mental illness. There is no support for this deprivation in either the holding or the reasoning of *Jones*. The Court rejected Jones's claim to an *Addington* hearing at the expiration of what would have been his maximum sentence if he had been convicted because "[t]here simply is no necessary correlation between severity of the offense and *length of time necessary for recovery*." 463 U.S. at 369 (emphasis added). By contrast, Petitioner in this case is conceded by the state's experts to be free from mental illness. Since it cannot be claimed that the state is "waiting" for his recovery, or providing him treatment in the hope of accomplishing that recovery, Louisiana has no constiutionally adequate justification for denying Petitioner a hearing at which the state is required to bear the burden of persuasion on the issue of prospective commitability.

Except for those insanity acquittees who remain presumptively mentally ill, this Court has never approved a protracted deprivation of physical liberty without requiring the state to bear the burden of persuasion, generally by a heightened standard of proof. *See Cool v. United States*, 409 U.S. 100, 104 (1972) (beyond a reasonable doubt standard constitutionally required in adult criminal prosecutions); *In re Winship*, 397 U.S. 358, 361-64 (1970) (beyond a reasonable doubt standard constitutionally required in juvenile delinquency proceedings); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (clear and convincing evidence constitutionally required for civil commitment); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (clear and convincing evidence required to preventively detain adults); *Schall v. Martin*, 467 U.S. 253, 278-79 (1984) (state must prove a "serious risk" of future criminal conduct for pretrial preventive detention of juveniles).

Placing the burden of persuasion on Petitioner to "prove" his "nondangerousness" is particularly unfair and onerous. As the court below has made clear, it will do him no good to demonstrate that he no longer has any mental illness. In the absence of mental illness, it is not apparent how Petitioner—or any other citizen, for that matter—can *prove* that he will never in the future be a "danger to others or to himself." La. Code Crim. Proc. Ann. art. 655 (West Supp. 1991). For acquittees who are no longer mentally ill, an analysis of the factors

in the calculus prescribed by *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), would require, at a minimum, that the state must demonstrate prospective dangerousness by at least clear and convincing evidence.

B. Petitioner's Confinement Cannot Be Distinguished from That of Other Persons Who May Have Committed a Criminal Act but Cannot Be Prosecuted or Punished for It.

Principles of equal protection are at least strained by the Louisiana statute as well. This Court has held that it does not violate the Equal Protection Clause to distinguish between acquittees who remain presumptively mentally ill and general commitment patients. *Jones v. United States*, 463 U.S. 354 (1983). But the case at bar presents a different equal protection issue. The comparison here is between two classes: (1) persons who "committed" a criminal offense but were acquitted by reason of insanity and who are not now mentally ill (such as Petitioner), and (2) other persons who committed such an offense but who cannot be punished now for some other reason. Examples in the latter class would include such groups as individuals on whose acts the statute of limitations expired before they could be tried; persons acquitted because of insufficient evidence where the later discovery of conclusive evidence of guilt cannot produce a conviction because of double jeopardy;[7] and persons who have completed their sentence of imprisonment.[8]

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[7] As Chief Justice Burger noted for a unanimous Court, "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). *See Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

[8] The state may not deny a prisoner a civil commitment hearing on his prospective dangerousness "solely on the ground that he was nearing the expiration of a prison term." *Baxstrom v. Herold*, 383 U.S. 107, 114 (1966).

The seemingly disparate groups in the second class have a great deal in common with one another and with Petitioner. Each consists of persons who committed an act which the state cannot now punish, but which may give rise to a concern about prospective dangerousness. Each is, in other words, a group which includes individuals who may be prospectively dangerous, but whom the state cannot incapacitate through its punitive authority under the criminal law. In each instance, the law's response to this dilemma is that whatever level of danger may be posed is outweighed by the value of individual liberty and of the rule of law. *In none of these classes of cases has this court permitted the previous act to serve as the predicate for preventive detention.*

The *Jones* class of presumptively mentally ill acquittees is distinguishable from these groups. *Jones* acquittees are persons who still have the mental illness that produced criminal acts. The state has a particular reason to be concerned about these acquittees because the same mental disability that produced acquittal in the first case may well do so for subsequent acts as well. And finally, members of the *Jones* class receive treatment designed to alleviate their mental illness. This treatment may constitute a benefit to persons suffering from mental illness, but, more significantly, is a positive step by the state to render the individual less likely to be dangerous by removing the causative mental illness.

Unlike *Jones* acquittees, Petitioner cannot be distinguished from the second group. Like them, he committed an act prohibited by law. Like them, there is some (unascertained) level of possibility that he may commit a future dangerous act, and that degree of likelihood may be affected by the fact that he committed such an act in the past.[9] And like them, he cannot be incapacitated

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[9] In fact, Petitioner's class, as a whole, may be *less* likely to repeat the previous act than the other classes. If an insanity acquittee's criminal act is the product of a mental illness that no longer exists,

through punitive imprisonment. Nevertheless, Louisiana claims the power to incarcerate [10] Petitioner to prevent the possibility of unspecified future acts of dangerousness.

In treating Petitioner differently from members of the second group of individuals, it deprives him of his fundamental right to physical freedom. It can offer no compelling—or even rational—justification for locking up Petitioner without any outer time limit or realistic prospect for release while allowing the others to remain at liberty.

III. ELIMINATING THE ESSENTIAL LINKAGE BETWEEN CIVIL COMMITMENT AND MENTAL DISABILITY DESTROYS THE THERAPEUTIC FUNCTION OF MENTAL HEALTH FACILITIES AND THE PROFESSIONALS WHO WORK IN THEM.

Mental hospitals and other mental health facilities are maintained to provide treatment to persons suffering the effects of mental illness. The mental health professions, in cooperation with state governments, have taken substantial strides in transforming these facilities from the "warehouses" and "snakepits" they had become in previous eras of neglect. *Cf.* A. Deutsch, *The Shame of the States* (1948). Success in this effort to modernize the therapeutic functioning of mental hospitals is still incomplete, but mental health professionals continue to work diligently toward that end.

Approving the involuntary confinement in mental hospitals of persons who have no mental illness would impede this professional effort. The statute under which

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the likelihood of recidivism may be lower than for those who escaped punishment by more capricious means, such as nondiscovery of evidence or the expiration of the statute of limitations.

[10] The term "hospitalize" would certainly be inappropriate in these circumstances, since Petitioner has no "illness" and the state concedes that it cannot and will not provide him "treatment."

Petitioner is confined transforms mental hospitals into prisons and turns mental health professionals into jailors. Therapists are required to confine individuals whom they cannot treat because they have no illness. As the American Bar Association has observed:

> To allow special commitment on the basis of a prediction of dangerousness in the absence of current mental disability ignores an essential element of civil commitment and converts special commitment into a form of imprisonment despite an acquittal . . . .

A.B.A., *Criminal Justice Mental Health Standards*, Standard 7-7.4, Commentary at 421 (1989).

Not only would affirmance of the ruling below validate and foster bad public policy in the mental health field,[11] stripping mental hospitals of their therapeutic mission and function, it may also be a constitutional violation in itself. In *Salerno*, when this Court emphasized the constitutional relevance of the time limits inherent in the Bail Reform Act, it noted that at some point "detention in a particular case might become excessively prolonged, and therefore punitive . . . ." 481 U.S. at 747 n.4. The prospect of limitless nontherapeutic confinement under the Louisiana statute crosses that line when an acquittee no longer has any mental illness.[12]

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[11] Following the amendment that will take effect in Virginia in 1992, 1991 Va. Acts 427, it appears that, at most, only six other states do not require mental illness as a prerequisite to the continued confinement of insanity acquittees either by statute or caselaw. *See* Appendix.

[12] As Professor Packer observed:

> So long as we can tie our concern about a person's future activity to something he has done in the past—some act that he has committed or some dangerous trait that he has manifested (usually through an act)—and so long as our main concern is with the protection of others rather than the betterment of the person being dealt with, it seems to me misleading to call our way of dealing with him anything but Punishment.

H. Packer, *The Limits of the Criminal Sanction* 28 (1968).

In previous cases involving mental disability, this Court has observed that some degree of judicial deference is warranted when legislatures "act in areas fraught with medical and scientific uncertainties . . . ." *Marshall v. United States*, 414 U.S. 417, 427 (1974). But no such deference is owed to the Louisiana statute because it involves no "medical or scientific uncertainties" because the commitment of a person who has no mental illness involves no "medical or scientific" issues. It is either punishment under the guise of civil commitment, or unvarnished preventive detention without the substantive, procedural, or durational limits that this Court has found to be required under the Due Process Clause.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the decision of the Louisiana Supreme Court.

Respectfully submitted,

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APPENDIX

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Forty-eight states, the District of Columbia, and federal law provide for acquittal by reason of insanity (Idaho and Montana have no provisions for a defense of insanity). It appears that, at most, only six jurisdictions, in addition to Louisiana, do not require mental illness as a prerequisite to the continued confinement of insanity acquittees either by statute or caselaw.

The following jurisdictions prohibit continued confinement on the basis of dangerousness alone in the absence of mental illness: Ala. Code § 15-16-67 (Supp. 1990); Alaska Stat. § 12.47.090(g) (1990); Ariz. Rev. Stat. Ann. § 13-3994(C) (1989); Ark. Stat. Ann. § 5-2-315(a)(2)(C) (Supp. 1989); Cal. Penal Code § 1026.2(e) (West Supp. 1991); Colo. Rev. Stat. § 16-8-115(2) (1986); Conn. Gen. Stat. Ann. § 17a-593(g) (West Supp. 1991); Del. Code Ann. tit. 11, § 403(b) (1987), *In the Matter of Lewis*, 403 A.2d 1115 (Del. 1979); D.C. Code Ann. § 24-301(e) (1989); Fla. Stat. § 916.17(3) (1982); Ga. Code Ann. § 17-7-131(f) (1990) (as amended by 1991 Ga. Laws 378); Ill. Ann. Stat. ch. 38, para. 1005-2-4(h) (Smith-Hurd Supp. 1991); Ind. Code Ann. § 35-36-2-4 (Burns 1985); Ky. Rev. Stat. Ann. § 504.030 (Baldwin 1984); Me. Rev. Stat. Ann. tit. 15, § 104-A(1) (Supp. 1990); Md. Health-Gen. Code Ann. § 12-113(b) (1990); Mass. Gen. Laws Ann. ch. 123, § 16(c) (West Supp. 1990); Mich. Comp. Laws Ann. § 330.2050(5) (West 1980); Minn. Crim. Proc. R. 20.02, subd. 8 (Supp. 1991); Miss. Code Ann. § 99-13-7 (1972); Mo. Ann. Stat. § 552.040(8) (Vernon 1987); Neb. Rev. Stat. § 29-3703(2) (1989); Nev. Rev. Stat. Ann. § 175-521 (Michie Supp. 1989); N.H. Rev. Stat. Ann. § 651:11-a(I) (1986); N.J. Stat. Ann. § 2C:4-9(b) (West 1982), *State v. Fields*, 77 N.J. 282, 390 A.2d 574 (1978); N.M. Sup. Ct. Rules Ann. 5-602 (Recomp. 1986) (N.M.R. Crim. P.); N.Y. Crim. Proc. Law §§ 330.20(8), (9), (12), and (13) (McKinney Supp. 1991); N.D. Cent. Code § 12.1-

.04.1-24(3)(a) (1985); Ohio Rev. Code Ann. § 2945.40 (Anderson Supp. 1990); Okla. Stat. Ann. tit. 22, § 1161 (West Supp. 1991); Or. Rev. Stat. § 161.346(1) (Supp. 1990); Pa. Stat. Ann. tit. 50, § 7304(g) (Purdon Supp. 1990); R.I. Gen. Laws § 40.1-5.3-4(h) (1990); S.C. Code Ann. § 17-24-40(C)(2)(c) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-26-12.5 (1988); Tenn. Code Ann. § 33-6-110 (Supp. 1990); Tex. Code Crim. Proc. Ann. art. 46.03(d)(4), (5) (Vernon Supp. 1991); 18 U.S.C. § 4243(f) (1988); Utah Code Ann. § 77-38-8(1) (Supp. 1990); Vt. Stat. Ann. tit. 13, § 4822 (Supp. 1990); 1991 Va. Acts 427 (effective July 1, 1992); W. Va. Code § 27-6A-4 (1986); Wyo. Stat. § 7-11-306(g) (1987).

The following jurisdictions appear on their face to permit continued confinement in the absence of mental illness: Haw. Rev. Stat. § 704-412 (1985); Iowa Code Ann. § 813.2, Rule 21(8)(e) (West Supp. 1991); Kan. Stat. Ann. §§ 22-3428(3), 22-3428a (Supp. 1990); 1991 N.C. Sess. Laws 37; Wash. Rev. Code Ann. §§ 10.77.150(2), 10.77.200 (1990); Wisc. Stat. Ann. §§ 971.17(4), (5) (West Supp. 1990).

Of the states not requiring mental illness for continued confinement, two differ substantially from Louisiana regarding duration of commitment. *See* Wash. Rev. Code Ann. § 10.77.020(3) (1990) (commitment cannot exceed the maximum possible penal sentence for any offense charged); Wisc. Stat. Ann. § 971.17(1) (West Supp. 1990) (commitment may not exceed two-thirds of the maximum term of imprisonment that could have been imposed; state bears the burden of persuasion by clear and convincing evidence).